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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re SIERRA M., a Person Coming Under
the Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN
& FAMILY SERVICES,

Plaintiff,

v.

JILL M.,

Defendant and Appellant;

SIERRA M.,

Respondent.

A109054

(Contra Costa County
Super. Ct. No. J04-01884)

Jill M. (Mother) appeals after the juvenile court ordered her daughter, Sierra M., removed from her home. She contends that: The juvenile court used the wrong standard of proof in evaluating the evidence; the court should not have taken judicial notice of the juvenile court file of Sierra's brother; she did not receive effective assistance of counsel; and the evidence does not support the court's findings and determinations. We affirm.

I. BACKGROUND

A. The Petition and Reports

Contra Costa County Children & Family Services (the Department) filed a petition pursuant to Welfare and Institutions Code¹ section 300 on October 13, 2004. According

¹ All undesignated statutory references are to the Welfare and Institutions Code.

to the petition, Sierra came within the jurisdiction of the juvenile court because Mother had a substance abuse problem that impaired her ability to parent; Mother did not regularly take the medication prescribed for her bipolar disorder; the family home had been found in an unsafe and unsanitary condition; and Mother had abused Sierra's brother by grabbing and squeezing his wrists, causing large swollen red marks and bruising. (§ 300, subds. (b), (j).) On October 14, 2004, the juvenile court detained Sierra and ordered supervised visitation with Mother.² Sierra was placed with her paternal grandparents.

Mother admitted two counts, which had been amended to allege that she had a history of substance abuse and bipolar disorder that impaired her ability to parent and that she had caused injury to Sierra's sibling's wrists. The juvenile court sustained those allegations and dismissed the other counts on October 26, 2004.

The Department prepared a disposition report for a November 8, 2004, hearing, recommending that Sierra remain out of Mother's custody and that Mother receive reunification services. According to the report, Mother had been involved with the child welfare system since the birth of her first child, Sean, and had an ongoing case in Santa Clara County regarding Sean. She acknowledged that she was not able to care for Sean due to his behavioral problems, but did not recognize the seriousness of her own problems. In particular, she did not understand the seriousness of the injuries she caused to Sean and how they related to her ability to care for Sierra. She attended individual therapy, but did not participate actively in the sessions, and did not consistently take the medication prescribed for her bipolar disorder. She was already receiving reunification services with regard to Sean, including substance abuse testing, individual and family therapy, domestic violence support groups, and parenting classes, but had not been consistent in keeping appointments for medication evaluation and monitoring. According to the report, a psychological evaluation completed in November 2003 indicated that Mother had an extremely difficult time utilizing reunification services, and that her high-

² The court also ordered supervised visitation with Sierra's father. The father is not a party to this appeal.

risk behaviors made effective change and long-term improvement in functioning and emotional stability unlikely. However, the report expressed hope that Mother might be able to provide a safe home for Sierra with ongoing therapy, medication, and sobriety.

The matter was continued, and the Department filed an updated report for a January 4, 2005, hearing. The report stated that Mother had been participating in individual therapy and had begun working on more difficult issues; that she was taking her psychotropic medication on a regular basis; that she was participating in a parent education class, which she was scheduled to complete in March 2005; and that she was participating in an anger management class. Mother had been instrumental in seeking and enrolling in those programs. She was participating in random drug testing, with negative results. The Department concluded the serious risk to Sierra had diminished, and that Mother had complied with all recommendations, was making progress with her case plan, and was interacting appropriately with Sierra. The Department recommended Sierra be returned to Mother's home and that family maintenance services be provided, if Mother's most recent drug test indicated she had not taken any unauthorized drugs.

B. Sibling's Juvenile Case

At the time of Sierra's January 4, 2005, disposition hearing, a case regarding her brother, Sean, was also pending in the juvenile court. Sean's file indicated that the Santa Clara County Social Services Agency filed a juvenile dependency petition in August 2003, alleging that Mother had failed to protect Sean. According to the petition, which was later amended, Sean had been placed in protective custody after Mother was admitted to Emergency Psychiatric Services for attempting suicide by placing a knife to her stomach and shutting herself in her bathroom. She told a social worker she had been hospitalized five times for suicide attempts. She had a history of using methamphetamines. Her live-in boyfriend, Kevin M., had a criminal record that included kidnapping, rape, forcible oral copulation, and burglary; and he had recently been arrested for domestic violence against Mother. A jurisdiction/disposition report filed on October 10, 2003, indicated there had been several child welfare referrals, beginning the day after Sean was born. The referrals had involved reports of emotional and physical

abuse, including poor interactions with Sean, threats to put him under water or bury him, screaming at him, beating him, dropping him, and neglecting his care. At times, the home was found to be unkempt. The report also noted Mother's history of abusing methamphetamines and alcohol, her mental illness, her failure to take her psychotropic medications, her history of suicide attempts, and Kevin's violence toward her and Sean. The Santa Clara County Juvenile Court found the allegations of the amended petition true.

A psychological evaluation prepared in Sean's case concluded Mother suffered from bipolar disorder, alcohol and amphetamine dependence in partial remission, and other disorders; and that her disorders made her unable to utilize reunification services or care for her son within the time available. A second evaluation concluded Mother suffered from depressive disorder, alcohol and methamphetamine abuse in remission, attention deficit disorder, and other disorders; that it was highly unlikely she would experience improved long-term functioning and emotional stability; and that she could not benefit from additional reunification services due to the severity of her mental disability.

Based on the psychological evaluations, the Santa Clara County Social Services Agency filed a petition in Sean's case pursuant to section 388 in January 2004, seeking to bypass reunification services to Mother. A disposition report recommended that reunification services for Mother be terminated and noted that Sean had been diagnosed with attention deficit disorder.

Sean's case was later transferred to Contra Costa County, where Mother was living. The Department prepared an addendum report in July 2004, asking that the section 388 petition be dismissed and that Sean continue as a dependent of the court in out-of-home placement with reunification services for Mother. According to the report, Mother had moved to a more appropriate residence with Sierra; she was completing a substance abuse treatment program; and she was participating in an outpatient treatment recovery program, which included domestic violence prevention, parent education, a women's issues group, alcohol and drug education and therapy, an interactive parent-

child program, relapse prevention, and individual therapy. All of Mother's drug tests had been negative, except one taken after she had been prescribed Vicodin for pain management after dental work. Mother had been receiving voluntary family maintenance services for Sierra, and was in compliance with her case plan. The report noted that Mother could be overwhelmed by the challenges of Sean's special needs and behavior, which included angry and aggressive outbursts, but concluded that reunification with Sean was likely in the next six months.

The juvenile court continued Sean in out-of-home placement, continued reunification services, and authorized him to have consecutive overnight visits with Mother. In August 2004, the Department recommended that Sean be returned to Mother's custody under the Department's supervision.

Sean was removed from Mother and placed in a foster home in October 2004, after the incident in which Mother injured his wrists. A November 2004 status review report noted that Sean had spent two days in Contra Costa County Medical Center's Emergency Psychiatric Services unit because of his aggressive kicking, hitting, and biting others.³ The report described Sean as having severe behavioral problems and targeting small children. When placed in his room for a time out, he would bang his head against the wall, and he had kicked holes in the wall. Mother reported that Sean had broken her finger during one incident. In the weeks after being removed from Mother's home in October 2004, Sean was removed from four foster homes, on at least three of those occasions due to his aggressive behavior. The report noted that Mother had completed her outpatient treatment; that her current drug tests had been negative; that she had not provided verification of her attendance at Alcoholics and Narcotics Anonymous after the end of July 2004; and that her therapy had been reduced from weekly to monthly visits due to Mother's "lack of active participation in confronting her mental health issues."

On December 8, 2004, the juvenile court continued Sean as a dependent child and ordered continued reunification services.

³ Sean had also claimed he had been sexually abused by another child in his foster home.

C. Disposition Hearing and Orders

A contested disposition hearing took place in Sierra's case on January 4, 2005. Sierra's social worker, Brittanie Flores, testified that she had recommended in the November 2004 disposition report that Mother receive reunification services rather than family maintenance services. In reaching this recommendation, she had reviewed Sean's file, and was concerned that the severity of the injuries caused to Sean indicated Mother might not be able to provide a safe home for Sierra, particularly if she was not addressing the underlying issues with her therapist. In connection with her case plan in Sean's case, Mother still needed to complete parenting, anger management, and domestic violence classes, to continue drug testing, to continue taking any prescribed medication, and to continue in individual therapy. She had completed a substance abuse outpatient program and was continuing with after care. Flores had learned from Sean's case worker that Mother was attending Narcotics Anonymous or Alcoholics Anonymous meetings. In total, Mother had received more than a year of reunification services in Sean's case. However, both Sean and Sierra were removed from Mother's care while she was receiving services, and even after she had completed a course of anger management and parenting classes.

Since November 2004, Flores had changed her opinion to conclude that Sierra could safely be returned to Mother because Mother had entered parenting and anger management classes, had continued in her individual therapy, and had resumed taking her medications. Mother had made progress in therapy, and she had begun addressing more difficult issues. Her therapist had told Flores that Mother had become more aware of the injuries she had caused Sean, that she was open to dealing with her problems with Sean as well as her personal problems, and that they were exploring those issues in therapy. In light of the difference between Sean's history and behavior and those of Sierra, Flores and the supervisors involved did not believe Sierra would be at risk if returned to Mother. In particular, unlike Sierra, Sean was overly aggressive and had other emotional problems.

The juvenile court judge expressed concern about the extent of Sean's problems and the neglect and abuse he had experienced. She also described herself as surprised and shocked by the Department's recommendation that Sierra return to Mother before Mother had completed her case plan. The court adopted the recommendations of the November 2004 disposition report, which included the recommendations that the court find that Sierra could not safely be returned home and that Mother should receive reunification services. This timely appeal ensued.⁴

II. DISCUSSION

A. Standard of Proof

Mother contends the juvenile court failed to find by clear and convincing evidence that one of the statutory grounds existed to remove Sierra from her custody. Section 361, subdivision (c) provides: "A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the [enumerated grounds for removal]." The grounds for removal include "a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody." (§ 361, subd. (c)(1).)

In the minute order following the January 4, 2005, disposition hearing, the court left blank the box indicating that there was clear and convincing evidence that Sierra's welfare required removal from her home based on one or more of the statutory grounds.⁵

⁴ The respondent's brief in this case was filed on behalf of Sierra, rather than the Department.

⁵ The court checked the previous box on the order, finding that "Return to home would create substantial risk to child's wellbeing." Mother contends that by checking this box, the juvenile court did not make the finding required by section 361, subdivision (c) to justify removal of a child from the parent's home, but instead made the finding specified for a six-month review hearing under section 366.21, subdivision (e), which requires the court to find by a preponderance of the evidence that the return of a child to the parent or guardian would create a substantial risk of detriment to the safety,

However, the court stated at the hearing that it would follow the recommendations in the Department's November 2004 disposition report, and the minute order stated that the court adopted the findings and recommendations of that report. The November 2004 report included the recommendation that the juvenile court, "[p]ursuant to section 361(c)(1), find by clear and convincing evidence that there is a substantial danger to the physical health, safety, protection or physical or emotional well-being of the child or would be if the child were returned home and that there are no reasonable means by which the child's physical health can be protected without removing the child from her parents' physical custody." Thus, the juvenile court made the required finding by clear and convincing evidence.

B. Judicial Notice of Sean's Case

Mother contends the juvenile court erred by taking judicial notice of the file in Sean's case. The minute order for the January 4, 2005, hearing contains the handwritten notation: "Court takes judicial notice of sibling case—Sean [M.] J04-00900." At the hearing, Mother's counsel asked the judge if she had the file from Sean's case. The judge replied that she did. Mother's counsel referred to the petition filed in Sean's case, and stated, "I have a copy of the petition here, and you must have it in the judicial notice file." The judge replied that she did, and that she was looking at one of the volumes of Sean's file.⁶ Mother's counsel then discussed with the judge the allegations of the petition in Sean's case and pointed out that Sean, unlike Sierra, had emotional problems. Later, in making her ruling, the judge noted that she had handled Sean's case in juvenile

protection, or physical or emotional well-being of the child. We reject this contention. As discussed below, the juvenile court adopted the disposition report's recommendation that it find the standards of section 361, subdivision (c)(1) to be met by clear and convincing evidence, and its failure to check the corresponding box on the minute order appears to be a clerical error.

⁶ The record does not include a copy of a request for judicial notice, and does not indicate who requested judicial notice.

court and was familiar with it, and expressed her concern that Sean's emotional problems might have stemmed from the neglect and abuse Mother had inflicted on him.

Mother contends the trial court erred by taking notice of Sean's entire file, rather than only specific documents in the file. Mother relies on *In re Amber D.* (1991) 235 Cal.App.3d 718, 724, which stated that in the context of a petition to terminate parental rights pursuant to Civil Code former section 232 (Stats. 1988, ch. 701, § 1, pp. 2331-2334), “ ‘the judge may take judicial notice of facts asserted in findings and orders in a prior juvenile court proceeding but cannot take judicial notice of the entire juvenile court file.’ ” (See also *In re David C.* (1984) 152 Cal.App.3d 1189, 1204-1205 [applying rule to Civil Code former section 232 (Stats. 1979, ch. 245, § 1 pp. 532-534) proceeding].)

Assuming without deciding that these cases accurately reflect the rule applicable to proceedings under section 361,⁷ we note that Mother did not object to judicial notice of Sean's file in the juvenile court. The failure to timely object to the propriety of judicial notice is deemed a waiver of the objection. (*Younan v. Caruso* (1996) 51 Cal.App.4th 401, 406, fn. 3.) As noted in *In re Dakota S.* (2000) 85 Cal.App.4th 494, 501, an appellate court ordinarily does not consider procedural defects or erroneous rulings where an objection could have been but was not made to the lower court. Here, not only did Mother not object, her counsel directed the court's attention to “the judicial notice file” and discussed the documents in Sean's file, partially in an effort to distinguish Sierra's case from Sean's. In the circumstances, any objection to the juvenile court's action in taking judicial notice was waived.

C. Ineffective Assistance of Counsel

Mother contends her counsel provided ineffective assistance by failing to object to the juvenile court taking judicial notice of Sean's file and by arguing against her interests.

⁷ As Sierra points out, *In re Ricardo L.* (2003) 109 Cal.App.4th 552, 566-568, indicates that in making jurisdictional findings pursuant to section 300, subdivision (j), which permits the juvenile court to assume jurisdiction over a minor when the child's sibling had been abused or neglected, it may be appropriate for the juvenile court to take judicial notice of or consider documents in the sibling's file. The court in *Ricardo L.* did not address the question of whether the court could take judicial notice of a sibling's entire file.

To prevail on a claim of ineffective assistance in a dependency proceeding, “there must be a showing that ‘counsel’s representation fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.’ [Citations.] Second, there must be a showing of prejudice, that is, ‘reasonable probability that, but for counsel’s professional errors, the result of the proceeding would have been different.’ ” (*In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711.) Such a claim may be brought by direct appeal if “ ‘there simply could be no satisfactory explanation’ for trial counsel’s action or inaction.” (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1254, disapproved on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.)

Mother has failed to meet that standard here. The record does not indicate that her counsel could have had no tactical reason for failing to object to the juvenile court taking judicial notice of Sean’s file. Mother’s counsel used Sean’s file to argue that Sierra’s case should be treated differently than Sean’s because Sean, unlike Sierra, had emotional problems. Moreover, Mother has pointed to no information in Sean’s file that would not have been admissible in Sierra’s case, whether through judicial notice or through other means. Bearing in mind that Mother had admitted the allegation that she had injured Sean, we cannot say that her counsel’s actions fell below the standard of reasonableness.

We also reject Mother’s contention that her counsel failed to represent her interests. The parties agree that the original transcript of the January 4, 2005, hearing indicated that Mother’s counsel argued against her interests. A corrected transcript,⁸ however, indicates that counsel for the Department argued that Mother had participated in services and had completed an outpatient program and a domestic violence program, and had completed a lot of drug testing; that Mother’s main problem was her mental health; that Mother was seeing a doctor who was monitoring her psychotropic

⁸ This court did not retain a copy of the original transcript of the January 4, 2005, hearing. The corrected transcript was prepared after this court granted Sierra’s motion to correct the reporter’s transcript. According to the motion, to which were attached declarations of all of the attorneys who were present at the January 4, 2005, hearing, the original transcript omitted the argument made by Mother’s counsel, and mistakenly attributed to Mother’s counsel the argument made by counsel for Sierra’s father, who contended that Sierra should not be returned to Mother’s home.

medications; that Sierra did not have Sean's behavior problems; and that the Department felt it would be appropriate to return Sierra to Mother. Mother's counsel limited her argument to the statement, "We certainly agree with county counsel."

We cannot conclude that Mother's counsel failed to represent Mother's interests, that she could have had no tactical reasons for her limited argument, or that the lack of further argument prejudiced Mother. Mother's counsel could reasonably have believed that the Department's attorney had made the best arguments available for returning Sierra to Mother and that further argument was unnecessary.

D. Substantial Evidence to Support Determinations

Mother contends the evidence does not support the juvenile court's dispositional findings, including its finding that there were no reasonable means to protect Sierra without removing her from Mother's custody. As noted above, children may not be removed from their homes unless there is clear and convincing evidence of a substantial danger to their physical health, safety, protection, or well-being and there are no reasonable means to protect the child without removal. (§ 361, subd. (c)(1); *In re Henry V.* (2004) 119 Cal.App.4th 522, 528.) In reviewing a contention that the evidence does not support the juvenile court's determinations under section 361, subdivision (c)(1), we apply the substantial evidence test to determine the existence of the clear and convincing standard of proof. (*Henry V.*, at p. 529.)

Mother contends that the evidence before the juvenile court does not meet this standard. In particular, she argues that the court improperly relied on stale evidence, including evidence in Sean's file; and that the more recent evidence indicated she was complying with her case plan, was no longer living with her abusive boyfriend, was not using drugs, and was addressing her mental health needs.

The evidence before the juvenile court indicated that Mother had been involved with the child welfare system since Sean's birth, with referrals for neglect and abuse. There was evidence that at the time Flores prepared the November 2004 report, Mother did not understand the seriousness of the injuries she had caused Sean, did not recognize how her mental health affected her ability to care for Sierra, was not taking her

medications regularly, and was not actively participating in her individual therapy. In making her initial recommendations, Flores had considered Sean's file, including the severity of the injuries inflicted on Sean, and Mother's history of substance abuse. Flores noted at the hearing that Mother still needed to complete various aspects of her case plan with regard to Sean, including parenting and anger management classes, and needed to continue with drug testing, therapy, and medication. Flores's understanding was that Mother was continuing in after-care for her substance abuse program and attending Narcotics Anonymous or Alcoholics Anonymous meetings, but she had not received proof from Mother. She acknowledged that Mother was receiving services at the time Sean and Sierra were removed from her, that Mother had completed parenting and anger management courses before she injured Sean, that Sean's case worker did not believe it was safe to return him to Mother's care, and that Sean's case worker had greater familiarity with Mother and her ability to raise children than she did. Mother had seen her therapist three or four times between the date Flores originally recommended that Sierra not be returned to Mother and the time Flores wrote the December 2004 report recommending return. The juvenile court considered the evidence, and expressed shock and surprise at the Department's decision to change its recommendation based on Mother's improved performance in therapy over such a short period of time.

We agree that the evidence supports the juvenile court's determination. Mother's mental health problems and difficulty in adequately caring for her children were long-standing, and had persisted despite many months of reunification services. Although Mother had made progress in the weeks before the disposition hearing, the juvenile court could properly conclude Sierra was not yet safe being returned to Mother's care.

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

RUVOLO, P.J.

REARDON, J.